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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services	)	CC Docket No. 92-115

To: The Commission

COMMENTS OF RADIOFONE, INC.
ON THE NOTICE OF PROPOSED RULEMAKING

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SUMMARY

The Commission's steps to streamline the licensing process in the Public Mobile Services will ultimately be thwarted if some its proposals are adopted without modification or clarification.

Radiofone opposes the Commission's proposed "first come, first served" licensing procedure, which is designed to eliminate random selection lotteries, especially where existing licensees would be precluded from the opportunity to file competitive applications to expand existing systems on frequencies already licensed. If the Commission is to adopt this procedure, Radiofone recommends that the Commission create an exception to the first filed rule to ensure that existing licensees on a particular channel have the opportunity to file competing applications against proposals which would preclude further expansion of the existing system. The public interest would not be served by eliminating a carrier's opportunity to improve an existing service by precluding the filing of competing applications.

Radiofone submits that Commission's proposal to grant all licenses in the Public Mobile Services on a conditional basis subverts the Congressional intent in framing Sections 312 and 316 of the Communications Act, as amended, which require notice and an opportunity for a hearing before the Commission can revoke or modify a license. If this proposal is not eliminated (as it should be), then Radiofone urges,

at a minimum, the Commission to clarify its proposal to indicate that "actual interference" must be caused by errors or omissions in the application's technical showings. Further, the Commission should only provide protection to a station within its protected reliable service contours; and any automatic shutdown (after a preliminary investigation) should be limited to the initial twelve-month period following the commencement of station operations, rather than the duration of the ten-year license term. In order for licensees to provide accurate technical showings, the Commission must designate an official database which may be relied upon for the preparation of interference studies.

The Commission should not modify its present minor modification notification procedures. The proposed procedures will eliminate licensees' flexibility to make minor modifications, such as relocations without an increase in service area contour, on a permissive basis, as may be necessary to ensure continuous communications service to the public. The Commission's proposal to require full Form 401 applications for what are now permissive modifications, will increase the number of applications and requests for Special Temporary Authority, which will further drain the Commission's already strained resources. So that licensees will have the opportunity for interference protection for minor modifications, Radiofone recommends that the Commission permit the filing of notifications in the present

form, so that permissive modifications, such as fill-in transmitters, will be entitled to protection from newcomer proposals.

While Radiofone agrees that the Commission's proposal to require FCC approval of settlement agreements may deter the filing of frivolous protests, it will nonetheless remove the necessary flexibility so that the parties can negotiate a fair settlement and encourage competitors to meddle in a licensee's business plan. In order to allow for fruitful negotiation between two parties who have filed competing applications for bona fide purposes (where both carriers have co-channel systems within reasonable expansion range of an existing facility), Radiofone recommends that the Commission revise proposed Rule Section 22.129 to allow payment not only for legitimate and prudent expenses associated with the preparation, filing and prosecution of the application, but also for the "lost opportunity" to expand its co-channel communications system.

Radiofone also recommends that the Commission's settlement conference proposal be clarified to ensure that the parties (and/or their counsel) are obligated, upon receipt of written notice from the FCC, to attend settlement conferences, and that only upon the failure to attend, can an application be dismissed for failure to prosecute. Radiofone also suggests that the Commission modify its rules regarding assignments and transfers of control to permit

purchasers a 90-day period, following the closing of the transaction, within which to complete a due diligence inspection of the acquired facilities to ensure regulatory compliance since sellers do not always make facilities available for inspection prior to closing.

Radiofone supports the Commission's proposal to allow the mailing of the Form 489 notification of construction to the FCC within 15 days of the commencement of service to the public. Radiofone recommends that this proposal be clarified to allow notifications of completion of construction to be filed or placed in the mail within 15 days of the commencement of service (even if this period falls after the expiration of the construction period) since many carriers utilize counsel and delivery services other than the United States mail to make filings with the Commission. In this regard, Radiofone opposes the Commission's definition of station operation as "providing service to the public." Rather, the definition of station operations should be "ready to provide service to the public on demand", which will take into account a system which has been constructed, but is not yet providing service because subscribers have not yet signed up for the service.

The Commission should retain the 30-day reinstatement period for expired authorizations to allow licensees to correct inadvertent oversights in the construction and license renewal process where the notification of completion

of construction or license renewal application is not timely filed because a Form 489 is accidentally overlooked, or a call sign is inadvertently omitted from a consolidated license renewal application. These perils afflict all carriers, especially larger carriers with numerous facilities under many different call signs. The elimination of the 30-day reinstatement period will only increase the risk that a license will accidentally be allowed to lapse, thus placing necessary communications service to the public in peril.

Radiofone supports, in concept, the Commission's finder's preference to reclaim unused spectrum. However, Radiofone is concerned that the Commission's proposal is potentially be fraught with abuse, and recommends that safeguards be adopted in order to ensure that only meritorious finder's preference applications are filed. In the same context, Radiofone also requests clarification of the Commission's program to ensure that parties invoking the finder's preference are not exempt from the restrictions of the Electronic Communications Privacy Act of 1986 and Section 705 of the Communications Act of 1934, as amended when monitoring channels for usage.

The Commission's proposal to modify licenses in the event of interference without notice and hearing violates Sections 312(a) and 316 of the Communications Act of 1934, as amended, for lack of due process. Radiofone recommends

that the Commission modify its proposal to provide affected licensees with notice and an opportunity for a hearing prior to any action. Likewise, Radiofone recommends that the Commission define what constitutes interference so that uncertainty and unnecessary litigation can be avoided, and that the current protections of Rule Section 22.100 be retained.

Finally, Radiofone urges the Commission to clarify its rules regarding the maintenance of obstruction marking and lighting on antenna structures to impose responsibility for complying with antenna tower obstruction marking and lighting requirements where it rightfully belongs -- on the tower owners.

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To: The Commission

COMMENTS OF RADIOFONE, INC.

Radiofone, Inc. (Radiofone), by its attorneys and pursuant to Section 1.415 (a) of the Commission's Rules, hereby submits its comments on the Commission's proposal to revise Part 22 of the Commission's Rules governing the Public Mobile Services.

Statement of Interest:

1. Radiofone's interest in responding to the Notice of Proposed Rule Making (NPRM) stems from the fact that it is a licensee in the Public Mobile Services, including the Public Land Mobile Service, the Rural Radio Service and the Domestic Public Cellular Radio Telecommunications Service. Radiofone applauds the Commission's efforts to simplify its rules. Nevertheless, Radiofone submits that in certain respects, the Commission has gone too far in its attempt to streamline licensing procedures. The Commission's desire to allow licensees greater flexibility in providing service to the public may actually be thwarted if some of its proposals are

adopted without clarification and/or modification. Accordingly, Radiofone's comments will be limited to those significant Commission proposals which it believes should not be adopted or which should be adopted only if modified. Radiofone will present its comments in the same order as presented by the Commission, first in the text of the NPRM and then in Appendices A and B thereto.

Section 22.509 - "First Come, First Served" Licensing

2. The Commission proposes to do away with the current 60-day cutoff procedure whereby applicants may file mutually exclusive applications within 60 days of the first-filed application listed on Public Notice. Instead, the Commission would grant licenses for any particular frequency on a "first come, first served" basis, with some exceptions. A lottery would be held between competing applications only if they are filed on the same day. The Commission states that the proposed procedure would expedite the processing of applications, prevent abusive filings and is therefore in the public interest.

Comment:

3. As a preliminary matter, it is not entirely clear that the Commission has the statutory authority to establish "first come, first served" licensing. While the Commission may establish reasonable limitations on the right to file a competing application, adoption of the Commission's proposal would effectively foreclose that right. In Ashbacker Radio

Corp. v. FCC, 326 U.S. 327 (1945), the Supreme Court held that the FCC was not permitted through its rules and policies to interfere with the statutory filing rights afforded to applicants. By so holding, the Court reasoned that "if the grant of one [application] effectively precludes the other, the statutory right to a hearing which Congress has accorded applicants before denial of their applications becomes an empty thing." 326 U.S. at 330. The courts have allowed, out of regulatory necessity, reasonable intrusions on the statutory right to file a competing application. In Ridge Radio Corporation v. FCC, 292 F. 2d 270 (D.C. Cir. 1961), the Court permitted the Commission to dismiss competing applications filed subsequent to the expiration of the designated 60-day cutoff period established for completing applications. The Court explained that, even though the FCC could not eliminate a statutory right provided to licensees/applicants by the Communications Act, it could, nevertheless, provide for administrative solutions that would place limitations on the exercise of those rights so long as the solution was reasonable. Id. at 772. See Ranger v. FCC 294 F. 2d 240 (D.C. Cir 1961). However, for the reasons stated below, adoption of the Commission's proposal would appear to constitute an unreasonable intrusion on the right to file a completing application.

4. In addition, Radiofone believes that the slight benefits resulting from eliminating lotteries would be far

outweighed by the disservice to Commission licensees who will inevitably be frustrated in their expansion plans. The adverse effects will be greater on small to medium sized carriers who, unlike larger well-financed carriers, must first build a core system and await its profitability before applying to expand the system. The fact that unscrupulous applicants seeking to thwart such expansion plans will have the opportunity to file preemptive strike applications, with the knowledge that no competing applications may be filed, is simply not in the public interest.

5. Moreover, Radiofone believes that implementation of the proposed procedure will actually provide an incentive for abusive preemptive strike filings rather than reducing the incidence of such filings. Under the present procedure, the victim of a preemptive strike filing at least has the opportunity to file a competing application and force the applications to a lottery. In some instances, this may serve to deter the filing of such abusive applications. Under the new procedure, however, the unscrupulous applicant will be encouraged to file the preemptive strike application with impunity, knowing full well that his victim will be unable to respond with a competing application. And while the proposed limits on the amount that can be paid to an applicant/licensee to settle a frequency conflict may help to deter many abusive filings, it will not deter those who file for a competitor's frequency in order to slow the development of the competitor's

system, or to create a gap in its coverage.

6. If the Commission is nevertheless inclined to adopt this proposal, Radiofone believes that the Commission should create an exception to this "first filed" rule, so as to ensure that existing licensees on a particular channel have the opportunity to file against proposals that would preclude their expansion of an existing system on the same frequency. For example, the proposal could be modified to allow an existing licensee to file a competing application for the same frequency if the existing licensee is able to show that it is already licensed for the frequency within 40 miles of its proposed antenna site. The competing application, as now, would have to identify the prior application as being mutually exclusive. If the existing license could show that a clean frequency was available for the new applicant, and that the new applicant was not already licensed for the existing licensee's frequency nearby, then the Commission should accept and grant a competing application filed by the existing licensee, and require the new applicant to amend to a clean frequency, or withdraw its application. If both carriers have the frequency licensed to them nearby (and thus have legitimate interests in the same frequency), then either: (1) the applications could promptly be joined for a lottery; or (2) the Commission could conduct a "paper hearing" whereby certain factors are weighed (such as the proximity and number of each applicant's existing facilities) and preferences

granted accordingly. The licensee with the most preference points would be awarded the grant. This would allow the Commission to achieve its objective of eliminating lotteries in all but those few cases where the competing applicant is able to show that it has a legitimate interest in a particular frequency. At the same time, it would ensure that existing licensees on a particular frequency are guaranteed the right to file against applications which would interrupt their continuous coverage or impede their expansion to the detriment of their public subscribers. It would also serve to deter the filing of abusive applications.

Section 22.147 - Conditional Grants

7. Under the proposed rule all grants in the Public Mobile Services after January 1, 1993 would be conditional. The Commission would then have the right to order any licensee to cease operation, without the opportunity for hearing, if "actual interference" results from operation "of stations authorized in reliance upon technical exhibits that contain errors or omissions." This provision is designed to enforce the Commission's proposal to no longer review the technical portion of applications but instead to rely on the applicant's certification that it is correct. The Commission's proposal would appear to require that an official data base be available to all applicants so that their interference analyses will be accurate.

Comment:

8. It appears that the Commission's proposal may be an attempt to circumvent the protection afforded by Sections 312 and 316 of the Communications Act of 1934, as amended. Under these statutory provisions, the Commission may not revoke or modify a license during its term without affording the licensee notice and opportunity for a hearing. These provisions were intended to provide an element of finality to Commission grants and to assure protection to licensees from arbitrary action by the Commission thereafter. Implementation of the proposed conditional licensing rule would allow the Commission to modify and possibly revoke the license without affording the licensee an opportunity for hearing.

9. The proposal is not saved by the fact that all grants would be labeled "conditional," thereby allowing the Commission to, in effect, revoke the grant without hearing if the condition is not satisfied. The exception to the protection afforded licensees by Section 312 of the Act for conditional grants is designed for those few, extraordinary situations where the Commission is not convinced that the public interest standard has been satisfied prior to making the grant but does not feel that a hearing is justified to determine whether the grant should be made. In those circumstances, conditional grants may be justified as eliminating unnecessary administrative burdens and litigation. However, for the Commission to make <u>all</u> license grants conditional so as to preserve the Commission's right

thereafter to either modify the grant during its term or revoke the license entirely would appear to subvert the intent of Congress in framing Sections 312 and 316 of the Act.

10. At the very least, the Commission should clarify the proposed rule to indicate that the alleged "actual interference" must be caused by either errors or omissions in the technical showing of the application. More importantly, "actual interference" should be clearly defined. Adjacent co-channel licensees should not be able to claim interference beyond their protected reliable service area contours. In addition, before a station is shut down under this rule, there should at least be a preliminary investigation to confirm that (a) there is, in fact, actual interference being experienced by a protected co-channel licensee; (b) the station to be shut down is, in fact, the source of this interference; and (c) the complaining co-channel licensee is operating in accordance with its license and the Commission's Rules (and thus is not claiming protection for service in areas covered only because it is operating with more that its authorized height and/or power, or it is experiencing interference within its protected service area only because it is not utilizing the full power authorized to it).

11. Implementation of the Commission's proposal would place a cloud on each license for the full license term -- possibly for up to ten years. Unavoidably, this would place a severe limitation on a licensee's ability to sell the

station during the then current license term. Since any harmful co-channel interference likely to result should surface within the first 12 months of the station's operation (encompassing the four seasons), the Commission should limit the condition on the grant and the provision for automatic termination to no more than 12 months following commencement of operation. During this period, the licensee should be required to operate the station for a sufficient period of time each day so that any resulting interference will become apparent to adjacent co-channel licensees. For example, the Commission could require a new station to be operated for 45 minutes out of each hour, from 9a.m. to 9p.m., Monday through Friday, with normal traffic supplemented by dummy transmissions, if necessary, to meet the operating requirement. After 12 months, if no actual interference resulted, the Commission would remove the condition on the license. If interference results after the first 12 months of the station's operation, the Commission should not be able to automatically shut down the station. Instead, the licensee should be entitled to a full investigation and an opportunity to correct any irregularities before the Commission issues a show-cause order pursuant to Section 312 of the Act.

12. Finally, if the Commission expects applicants to submit accurate co-channel studies upon pain of termination of the authorization in the event the co-channel interference study is incomplete or inaccurate, the Commission must provide

an official data base which may be relied upon in preparing such interference studies. Indeed, it appears that Section 552 (a)(2)(C) of the Administrative Procedure Act (APA) requires the Commission to maintain an official database before it may adopt its proposed conditional licensing scheme.[1] Accordingly, the Commission should establish an official data base for use by applicants. The Commission has proposed to allow applicants to "certify" the accuracy of their engineering proposals and thereby allow grant of their applications without technical review by the Commission's staff. In order for this proposal to be successful, applicants must have an official data base on which they may rely in order to make the required certification. See footnote 2, infra.

Sections 22.163 and 22.165 - Minor Modifications and Additional Transmitters

13. The Commission proposes to define "minor modifications" under the criteria establish in proposed Rule Section 22.123. This new rule section would classify as major any increase in antenna height, increase in effective radiated power or relocation of a transmitter as "major," even if

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[1] This pertinent provision of the APA provides, in effect, that Commission records may not be relied upon by the agency or used against a party unless such records have been indexed and published or otherwise made available. However, in the proposed Rule Section 22.101, the Commission apparently seeks to avoid this obligation by limiting official research sources to the Commission's station files. While the Commission's files may contain the necessary technical data, they are not indexed in any useful way, as required by Section 552 (a)(2)(C) of the APA.

offsetting modifications preclude an increase in the reliable service area contour and interference contour. Proposed Rule Sections 22.163 and 22.165 would eliminate the requirement that a notification be filed for permissive modifications or for fill-in transmitters whose contours would be encompassed with an existing contours on the same frequency. Because the Commission would not have any record of these modifications or additional transmitters, the operations involved would not be protected from harmful co-channel interference. The Commission's rationale for these proposals is that they would reduce the number of notifications filed and thus conserve Commission and industry resources.

Comment:

14. Radiofone opposes the change to the minor modification notification procedure inasmuch as it would eliminate the ability to implement minor antenna height, effective radiated power and location changes as permissive modifications despite the fact such minor changes would not result in an increase in co-channel interference potential. The ability to implement such changes on a permissive basis is important for adjusting authorized operations in light of unanticipated technical problems. The ability to modify on a permissive basis is also helpful in allowing licensees to ensure continued service following a loss of a transmitter site due to the actions of a hostile site owner or for some other reason requiring an antenna site to be vacated on short

notice. If implemented, the Commission's proposal would require the filing of major modification applications in each such instance and would undoubtedly lead to a substantial increase in the volume of filings of requests for special temporary authority in those frequent instances, for example, where a licensee has to vacate an antenna site without advance notice or on very short notice. This hardly comports with the Commission's desire to streamline the application process; indeed, it would have the opposite effect.

15. In addition, Radiofone opposes the Commission's proposal that facilities established under the permissive modification rule not be entitled to interference protection. A literal interpretation of this restriction would mean that a licensee who makes a permissive relocation, for example, could be forced off the air by the later filing of another applicant. So long as the contours of additional transmitters are within presently authorized contours on the same frequency, there is no reason why these facilities should not be entitled to the same protection granted to the originally authorized station. With regard to the Commission's proposal to delete the notification requirement, this is a two-edged sword. Without the filing of such notifications, the licensee will have to keep extremely accurate records of any modifications it makes and additional transmitters installed. For licensees with numerous transmitter sites, such as Radiofone, the record keeping could be quite onerous.

An alternative would be to allow licensees to file notifications of permissive modifications and additional transmitters on FCC Form 489 if they desire, in which case they would be entitled to full protection from co-channel interference. This would also give licensees the option of creating an "official" record of their station status.

Section 22.101 - Station Files

16. The Commission proposes to codify existing policy that the Commission's files constitute the only official records for Part 22 stations. There would be no official data base upon which licensees and applicants may rely in determining the location of stations or pending applications on a particular frequency.[2]

Comment:

17. As indicated in footnote 1, supra, Section 552 (a)(2)(C) of the APA requires that the Commission maintain an

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[2] There is an apparent inconsistency between the text of the NPRM, at paragraph 12, and the wording of the proposed Section 22.101. The text states, at paragraph 12:

> "We are presently undertaking efforts to eliminate from our computer data base duplicate and erroneous records of expired facilities. Our intent is to make this data base as accurate as possible [to enable applicants to provide reliable technical exhibits]." (Underlining added)

The Commission thus contemplates that applicants will use its data base in preparing "reliable technical exhibits." If the Commission's data base is faulty for whatever the reason, why should applicants be penalized for relying on it? This inconsistency needs to be resolved.

official data base in which station information is properly indexed in a usable form (by frequency and location, in this case) before the Commission may use such information to the detriment of a licensee or applicant. In order for applicants to be able to certify as to the accuracy of technical showings in applications, applicants must have an official data base sanctioned by the Commission and suitably indexed, on which they may rely to make the required certification. The Commission may not abrogate its responsibility under the Administrative Procedure Act by requiring applicants to use un-indexed station files which go back 40 years or more for the purpose of determining the location of protected co-channel stations.

Section 22.129 - Dismissal of Applications

18. Inter alia, the Commissions proposes to require prior approval of any settlement of a frequency conflict or protest situation. Section 22.29 currently requires only that the Commission be notified of the settlement. Proposed Section 22.129 (a) would also require that the parties submit their written settlement agreement to the Commission for approval; and it would limit any payments of cash (or "other consideration") made pursuant to the settlement to "legitimate and prudent expenses" incurred in filing, prosecuting and/or settling the application or petition to deny for which reimbursement is sought. These proposed rule changes are designed to discourage the filing of applications or protests

for the purpose of extorting a settlement.

Comment:

19. Radiofone believes that the changes may in part accomplish this goal. However, they will not be totally successful since the primary reward for most abusive filings is delay that a completing application or petition to deny causes to a competitor, as well as the opportunity to win the frequency at lottery (and thereby block a competitor's expansion of service and/or to sell the awarded license to the competitor at an extortionate price later). Thus, the effectiveness of the Commission's proposal is questionable; and the new procedure will certainly reduce the flexibility which parties currently have in negotiating a settlement.

20. Radiofone opposes the requirement that would make written settlement agreements part of the public file. This will only invite other competitors to meddle in a licensee's business plans. Moreover, the restriction on "other consideration" exceeding legitimate and prudent expenses may very well frustrate advantageous settlement proposals, especially the swapping of cellular licenses.

21. Finally, Section 22.129 (a)(1) should be revised to provide an exception to the general rule that dismissing applicants may only be reimbursed for their legitimate and prudent expenses in preparing, filing and prosecuting the application. There will be instances where one or more competing applications has been filed for a bona fide purpose,

e.g., where the application is filed by a carrier who has the frequency under application assigned within reasonable expansion range of an existing facility on the same frequency, say 40 miles. In that instance, the dismissing applicant would have a bona fide right to the frequency and dismissing the application would be giving up a valuable right which may well go beyond the cost of preparing, filing and prosecuting the application. Accordingly, the Commission should make an exception to the general rule by providing that a dismissing applicant who presently has the frequency under application assigned within 40 miles of the proposed site should not be limited to reimbursement of reasonable and prudent expenses.

Section 22.135 - Settlement Conference

22. The Commission proposes to create a procedure codifying its informal policy of calling in opposing applicants (or litigants) to attempt to forge a settlement. The penalty for failing to attend a scheduled settlement conference, following reasonable notice, will be dismissal of the party's application or petition, for failure to prosecute.

Comment:

23. The Commission should clarify that parties are not under any obligation to reach a settlement at such conferences. There may be instances in which one party, but not the other, is well within its rights. The Commission's desire to forge settlements rather than addressing the substantive issues raised in a protest proceeding or created

by competing applications should not deprive the litigants or applicants of their rights. The Commission should also clarify that settlement conferences would not be scheduled until each party has had an opportunity to respond with a time and date convenient to them (or their attorneys) for such conference. Also, the Commission should not dismiss an application or petition for failure to attend the conference unless it is verified that the party was indeed aware of the scheduled conference. Otherwise, the Commission may send a conference notice that is lost in the mail or otherwise does not reach the applicant/petitioner and then dismiss the filing unjustly.

Section 22.137 - Assignment of Authorization; Transfer of Control

24. The Commission is proposing to add language to the assignment of license rule (currently Section 22.39) to require that "the assignee is responsible for ascertaining that the station facilities are and will remain in compliance with the terms and conditions [of the] authorization to be assigned." This proposed language codifies a policy that is already in affect, but fails to clarify the extent of the assignee's responsibilities.

Comment:

25. Not all assignors are willing to allow full inspection of their stations prior to closing. Moreover, the condition of the Commission's files often makes it difficult for an assignee to determine how the assigned station is